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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

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3 LEARNING ANNEX HOLDINGS, LLC,
4 and LEARNING ANNEX, LLC,

Plaintiffs,

v.

09 Civ. 4432 (SAS)

6 WHITNEY EDUCATION GROUP, INC.,
7 et al.,

8 Defendants.

9 -----x

10 July 13, 2011
11 10:50 a.m.

12 Before:

13 HON. SHIRA A. SCHEINDLIN

District Judge

14 APPEARANCES

15 HARRIS, CUTLER & HOUGHTELING LLP

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25 and Cash Flow Technologies, Inc.

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1 THE DEPUTY CLERK: All rise.

2 THE COURT: Please be seated.

3 MR. RAPOPORT: Good morning, your Honor.

4 MR. HARRIS: Good morning, your Honor.

5 THE COURT: Okay. When we finished trial yesterday
6 and I said good-bye to all of you, I realized we had an
7 unfinished piece of business. And that is on the unjust
8 enrichment claim, as you know, that issue is really for the
9 Court.

10 And since it's also, according to law of the case, a
11 predicate for the finding of quantum meruit, there's really no
12 verdict until the Court hears the non-jury portion of the case.

13 And as you also recall, there were three elements to
14 unjust enrichment; two of them were for the jury, very simple
15 questions, and they found both of those questions, not
16 surprisingly, because they are so straight forward, and those
17 questions were: Has Learning Annex proven by a preponderance
18 of the evidence that Rich Dad received services provided by
19 Learning Annex? They said yes. Has Learning Annex proved by a
20 preponderance of the evidence that Rich Dad benefited from the
21 receipt of those services provided by Learning Annex? They
22 said yes.

23 But it's the third element that is for the Court, not
24 for the jury. I said I would take it as an advisory verdict,
25 but as you know, I'm not bound by it. And, that is, under

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1 principles of equity and good conscience, should Rich Dad be
2 required to pay for these services? And that's the issue today
3 for the Court.

4 We started to discuss this last Friday afternoon when
5 the defense made its motion for directed verdict. I remember
6 Mr. Rapoport began his argument saying, there's no way that
7 Rich Dad had done anything wrong. And then response, Mr.
8 Harris began to point to some piece of evidence in the record.
9 But I don't consider that a sufficient argument or proffer or
10 trial to the Court. So I thought that's why we're here today.

11 That said, I thought I'd give it only an hour. So I
12 thought -- I think, unless you think there's any additional
13 evidence that needs to be put before the Court that wasn't
14 before the jury. In the absence of evidence, it's really
15 argument and pointing to the exhibits that you might want me to
16 look at.

17 You know, I gave one of the witnesses my first book
18 and -- the Zanker book, so I don't have that.

19 The Court Reporter says it's sitting right there. Can
20 you get it off the witness stand? He thinks it's right there.

21 MR. HARRIS: Yes, your Honor.

22 THE COURT: That was my copy.

23 MR. HARRIS: Your Honor, we have a binder of the
24 exhibits in evidence, which may be better.

25 THE COURT: All right. You want to do that, that's

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1 okay too. That's okay too.

2 (Hanging)

3 THE COURT: Thank you.

4 MR. HARRIS: It's the plaintiff's exhibits in
5 evidence, your Honor.

6 THE COURT: All right. So let me state for the
7 record, Mr. Harris or Mr. Deitch, do you want to offer any
8 further evidence --

9 MR. DEITCH: No, your Honor.

10 THE COURT: -- to the Court on this issue?

11 MR. HARRIS: No, your Honor.

12 THE COURT: Mr. Rapoport?

13 MR. RAPOPORT: No, your Honor.

14 THE COURT: All right, so the evidence is the same
15 evidence that the jury heard.

16 That said, it's your burden of proof, as usual. So
17 you want to explain the evidence?

18 MR. HARRIS: Mr. Deitch will be doing the argument,
19 your Honor.

20 MR. DEITCH: Good morning, your Honor.

21 Your Honor, there's overwhelming evidence in this case
22 of wrongful conduct. We respectfully submit this is not a
23 showing that we need to make at this time, and that it is not
24 necessary to support the jury verdict, and I'll address --

25 THE COURT: Wait, wait, wait a minute. Haven't I

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1 already ruled that unjust enrichment is a matter for the Court?
2 I sent you an opinion that said that over the weekend. I think
3 I've since docketed it and it's filed. So if you're saying,
4 despite your ruling we want to preserve for the record our
5 objection, we don't believe it's for the Court, despite the
6 explicit direction of the pattern jury instructions that a jury
7 may never decide enrichment, you want to take the position that
8 was an issue for the jury, not for the Court.

9 MR. DEITCH: That's our position, your Honor, and for
10 the record.

11 THE COURT: Record of what? I've already clearly
12 ruled but -- and so has New York State, but go ahead.

13 MR. DEITCH: But, your Honor, we are going to address
14 the evidence of wrongful conduct in detail as the Court has
15 asked us to.

16 In this case, your Honor, there were at least four
17 types of wrongful conduct. And I'm going to review them now
18 and make reference to the particular exhibits and some of the
19 testimony that evidences that misconduct.

20 THE COURT: Okay. I've asked you to pause for a
21 minute, I want to take notes, I don't have the computer running
22 yet.

23 MR. DEITCH: Okay.

24 THE COURT: Just take a minute.

25 (Pause)

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1 THE COURT: Okay. You were saying there were four?

2 MR. DEITCH: Yes, your Honor, and I'll give them four
3 descriptive labels, and then I'll go through each them.

4 The first label is lies; the second, the cover up; the
5 third, pretext, and the last, the prime rose path.

6 First I'll talk about the lies. And there were at
7 least, there are at least two lies that I want to talk about
8 with the Court today. The first involves the two e-mails that
9 Ms. Lechter sent on February 2nd, 2006, the one that she sent
10 to Mr. Zanker at 11:15 p.m, that's Exhibit 132, and the one
11 that she sent eight minutes later to Whitney at 11:23 p.m.,
12 that's Exhibit 128.

13 In the first of those e-mails, your Honor certainly
14 recalls that Ms. Lechter stated unequivocally, everything is
15 off. And she also stated, we are stopping negotiations with
16 Whitney. This was a simple unequivocal statement that
17 everything, all of the discussions about forming the new free
18 seminar business was off.

19 It was also a simple and unequivocal statement that
20 Rich Dad was stopping its discussions with Whitney about
21 developing a new free seminar business, and those two
22 statements were simply a lie.

23 Eight minutes later, as the Court knows, Ms. Lechter
24 sent an e-mail in which she told John Kane that they love
25 Whitney, and asked Mr. Kane to call her ASAP, as soon as

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1 possible in the morning and gave her cell phone. This, your
2 Honor, is crystal clear unequivocal evidence that Rich Dad
3 affirmatively lied and misled Bill Zanker and the Learning
4 Annex as to whether Rich Dad intended to pursue the new
5 business that Mr. Zanker had developed with the new business
6 partner that he had recommended.

7 THE COURT: All right. So really you're saying this
8 is one lie.

9 MR. DEITCH: It's one lie that is evidenced by the two
10 e-mails.

11 And that second e-mail, just in case I didn't say it
12 clearly, was exhibit 128.

13 THE COURT: You did say that.

14 MR. DEITCH: The second lie that I referenced when I
15 said there were two lies that I wanted to talk about, involves
16 the waiver e-mail on February 14th. The Court will recall Mr.
17 Zanker gave uncontradicted testimony that on February 14th,
18 2006 he spoke with Ms. Lechter, and that Ms. Lechter said that
19 she needed Mr. Zanker to send an e-mail for housekeeping
20 purposes in which he gave up his claim for compensation for the
21 Whitney deal. And, your Honor, that testimony appears in the
22 transcript from page 204, line 25, to 205, line 14. And during
23 the conversation -- and this is unrebutted in this trial
24 testimony, in the trial testimony or in the documentary
25 evidence -- Ms. Lechter repeated the lie that the Whitney deal

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1 was off. She told him that Rich Dad was not negotiating with
2 Whitney. And that testimony specifically is on page 205, line
3 eight and lines 12 to 14.

4 And, your Honor, the jury clearly believed Mr.
5 Zanker's testimony in this regard, in that it made a specific
6 finding on the special verdict sheet that Rich Dad had not
7 carried its burden of proof that the February 14th waiver was
8 knowing and voluntary. And given the facts of this case, that
9 jury finding necessarily meant that the jury found that Rich
10 Dad at a minimum failed to inform Mr. Zanker that Rich Dad was
11 still negotiating with Whitney that there were something that
12 he was giving up by giving that waiver. And, of course, it is
13 consistent with Mr. Zanker's testimony that Rich Dad did more
14 than that, that they lied to mislead Mr. Zanker and to
15 fraudulently procure the waiver.

16 THE COURT: So, according to you, on the telephone
17 call Lechter specifically says Rich Dad is not negotiating with
18 Whitney. She tells Zanker that on February 14th.

19 MR. DEITCH: Yes. Mr. Zanker testified to that, that
20 she told him that there was no Whitney deal, they weren't
21 talking to Whitney.

22 It's clear, your Honor, that at that point in time

23 THE COURT: They were talking to Whitney then?

24 MR. DEITCH: Yes, your Honor, I'm going to get to
25 that. That's part of the cover up.

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1 It's clear that Rich Dad, at a minimum, at that point
2 was highly concerned that it owed a fee to the Learning Annex
3 and that the Learning Annex had a reasonable expectation that
4 it was going to collect that fee or it was entitled to that
5 fee. And to address those concerns, Rich Dad chose to lie.
6 And we believe that these two lies, taken either individually
7 or together, the two lies being the February 2nd lies and the
8 February 14th lie, are sufficient to satisfy the requirement
9 that the Court has said Learning Annex must satisfy in this
10 hearing.

11 This is consistent with New York law on unjust
12 enrichment, in that the courts have said that it is contrary to
13 equity and good conscience to permit a party to benefit from
14 its own misrepresentations. And I direct the Court's attention
15 to the case of Waldman, W-a-l-d-m-a-n versus New Chapter,
16 citation is 714, 714, F. Supp. 2d, 398. It's a case from the
17 Eastern District of New York in 2010.

18 THE COURT: I'm sorry, that one was Waldman you said?

19 MR. DEITCH: Waldman, W-a-l-d-m-a-n.

20 THE COURT: Versus?

21 MR. DEITCH: New chapter.

22 May I continue?

23 THE COURT: One second.

24 MR. DEITCH: Okay.

25 THE COURT: Okay.

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1 MR. DEITCH: Okay. And the reason I mention the
2 Waldman case and the principle that equity and good conscience
3 do not allow a party to benefit from its misrepresentations, is
4 because we believe that the law in New York requires an
5 inequity that does not necessarily include wrongful conduct.
6 While proof of wrongful conduct will show inequity --

7 THE COURT: Yeah, I think that's right. I don't think
8 that New York law requires wrongful conduct, per se.

9 MR. DEITCH: I'm sure your Honor is familiar with the
10 Simmons V. Simmons case and its progeny that basically stands
11 for that proposition.

12 THE COURT: That's New York law, New York case.

13 MR. DEITCH: Yes.

14 THE COURT: Not a Federal case.

15 MR. DEITCH: Correct.

16 THE COURT: That's a New York case, yeah.

17 MR. DEITCH: Your Honor, the second form or the second
18 category of wrongful conduct that I want to address has to do
19 with the cover up, and this will address the Court's question
20 about what was going on between Rich Dad and Whitney through
21 this period. And this cover up extends over three consecutive
22 periods. The first being from the February 2nd termination
23 through the February 14th waiver e-mail. The second being from
24 that date, February 14th, to the execution of the letter of
25 intent March 26 between Whitney and Rich Dad, and then from --

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1 THE COURT: Hold on one second.

2 MR. DEITCH: -- the execution of that letter -- I'm
3 sorry.

4 THE COURT: That's okay. Go ahead.

5 MR. DEITCH: Then from the execution of that letter of
6 intent in late March until the announcement in the fall of
7 2006, the public announcement about the Whitney deal.

8 The first exhibit to which I would draw the Court's
9 attention is Exhibit 128. And this is, this is Sharon
10 Lechter's -- this I referenced before, it's Sharon Lechter's --

11 THE COURT: Right, the 11:23 e-mail.

12 MR. DEITCH: Right, yes 11:23 p.m. e-mail, yes. And
13 in that e-mail Ms. Lechter asked to speak to Mr. Kane as soon
14 as possible. She also indicated that she was planning to go to
15 a Whitney seminar in Phoenix the following week. And the
16 reason I bring that to the Court's attention is that Exhibit
17 141, which is a February 13th e-mail from Ms. Lechter to
18 Mr. Kane, Ms. Lechter writes to Mr. Kane and tells him how
19 pleased the Rich Dad personnel were who attended the Whitney
20 seminar. And she specifically said, at the end of that e-mail,
21 that she was looking forward to furthering their discussions
22 that week. Clear evidence that they were in fact having those
23 discussions. And these, of course, are the discussions that
24 Rich Dad had told the Learning Annex that it stopped as of
25 February 2nd. And these are the discussions that she denied

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1 were happening the following day, February 14th, when she
2 told -- when she asked Bill Zanker for the waiver e-mail.

3 THE COURT: So he wrote the e-mail the same day as the
4 alleged telephone call between him and Lechter.

5 MR. DEITCH: No. I believe this e-mail was
6 February 13th, and that telephone call was the following day.

7 THE COURT: I thought the waiver e-mail is
8 February 14th?

9 MR. DEITCH: It is. And this e-mail from Mr. Kane is
10 on February 13th.

11 THE COURT: I don't mean that. Sorry. Lechter's
12 phone call with Zanker is the same day as he writes his
13 February 14th e-mail?

14 MR. DEITCH: That's correct.

15 THE COURT: Okay.

16 MR. DEITCH: This is Mr. Kane writing on a previous
17 day, or Ms. Lechter.

18 THE COURT: I know. The phone call is the same day.
19 Okay.

20 MR. DEITCH: Okay. Now in that same e-mail, this is
21 exhibit, still exhibit 141.

22 THE COURT: Yeah.

23 MR. DEITCH: Ms. Lechter -- that e-mail was forwarded
24 to Russ Whitney, and his e-mail appears at the top of the first
25 page. And Mr. Whitney notes that Robert Kiyosaki had called

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1 him and left a message along with his cell phone -- left a what
2 he describes as a very nice message. And, again, further
3 evidence that there are discussions and contacts going on
4 between Rich Dad and Whitney during that period.

5 Ms. Lechter also said, in that e-mail, that she would
6 give Mr. Kane a call the next day, and this is a quote, to
7 update you on our progress with Bill Zanker. And of course
8 this raises a question, progress with what with Bill Zanker?
9 Bill Zanker had been terminated.

10 THE COURT: Lechter tells who?

11 MR. DEITCH: Mr. Kane.

12 THE COURT: Oh, Kane, that she will update him on the
13 progress with Zanker?

14 MR. DEITCH: She says I'll give you a call tomorrow,
15 quote, to update you on our progress with Bill Zanker.

16 THE COURT: Is that in exhibit 141?

17 MR. DEITCH: Yes. That's a quote.

18 And I suggest, your Honor, that the Court may infer
19 that Rich Dad was specifically attempting to obtain that waiver
20 to wrongfully cut the Learning Annex out of its entitlement to
21 compensation for the deal.

22 Okay. The next, the next document also supports that
23 inference. This is Exhibit 223. This was undated. If you
24 recall, your Honor, there was one e-mail that was missing that
25 this is -- it's missing a header at the top. But it's the

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1 e-mail in which Ms. Lechter forwarded the waiver e-mail to Mr.
2 Kane. And what she says she's forwarding is, quote, the
3 results -- she has the word results in quote marks. The
4 results are from meeting last Friday with Mr. Zanker.

5 THE COURT: What's the date of last Friday?

6 MR. DEITCH: I'd have to look at a calendar. If you
7 give me the exhibit, it may give the day of February 14th.

8 THE COURT: Yeah, that's what you have to do.

9 MR. HARRIS: Your Honor, if I turn my phone on, I may
10 be able to get that date for that year.

11 THE COURT: Sure.

12 MR. DEITCH: February 14th was a Tuesday, so that
13 following Friday would be February 17th.

14 MR. HARRIS: No.

15 MR. RAPOPORT: The 10th.

16 THE COURT: Right.

17 MR. RAPOPORT: It would be February 10th. The
18 previous Friday.

19 MR. DEITCH: No. Bill Zanker's e-mail is sent on
20 Tuesday, the 14th.

21 THE COURT: Right. And he says I'm forwarding the
22 results of my meeting last Friday with Zanker. So it's the
23 previous.

24 MR. DEITCH: He may be referring to the previous
25 Friday, which would be the 10th.

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1 THE COURT: It says the results of my meeting last
2 Friday, okay.

3 MR. DEITCH: Yes, that would be February 10th.

4 THE COURT: Is there any testimony about that
5 February 10th meeting between Lechter and Zanker?

6 MR. HARRIS: Your Honor, there is testimony that --

7 THE COURT: Either of them -- two people testified
8 here, Lechter and Zanker, one by deposition. Did either of
9 them mention a February 10th meeting?

10 MR. HARRIS: Your Honor, I don't recall if it was
11 mentioned by date.

12 THE COURT: Okay.

13 MR. HARRIS: But there is a document in the record
14 from -- I can get you the exhibit number -- February 7th
15 talking about them doing things together about the Rich Woman
16 book, and there's testimony about how in that period they
17 talked about working on Expos and other things like that.

18 THE COURT: You can look in the transcripts of both
19 Lechter and Zanker and see if they said anything about the
20 Friday meeting, February 10th. Okay, go ahead.

21 MR. HARRIS: It's Zanker specific.

22 THE COURT: Okay, go ahead.

23 MR. DEITCH: In that same e-mail, Exhibit 223, in
24 which Ms. Lechter forwarded the February 14th Bill Zanker
25 e-mail, she says that she's looking forward to seeing Mr. Kane

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1 in Dallas. And that was the Expo to be held on February 18th
2 and 19th of that year, so that following weekend. And she
3 says, she's looking forward to seeing him in Dallas, quote, to
4 discuss next steps. Again, further interest -- further
5 evidence that while Rich Dad continued to hide its ongoing
6 discussions with Whitney from the Learning Annex, they were in
7 fact discussing the next steps in the development of their
8 business relationship.

9 And Mr. Kane testified, and this was uncontradicted,
10 that he and Russ Whitney had --

11 THE COURT: I'm sorry, who testified?

12 MR. DEITCH: This is Mr. Kane who testified.

13 THE COURT: Kane.

14 MR. DEITCH: By deposition.

15 THE COURT: Right. And he said?

16 MR. DEITCH: He said that he and Russ Whitney had
17 dinner with the Kiyosakis on the night of February 18th in
18 Dallas, and that the discussion at dinner was fairly -- what he
19 called fairly positive, and that they discussed the fact that
20 they were looking forward to working with each other. And this
21 appears in the trial transcript pain 544, line six through page
22 545, line six.

23 THE COURT: Okay.

24 MR. DEITCH: So that's mid February. And, of course,
25 your Honor knows -- and this is exhibit 231 -- that a letter of

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1 intent was signed between --

2 THE COURT: Did you say 241?

3 MR. DEITCH: 231.

4 THE COURT: Thank you.

5 MR. DEITCH: Was signed between Whitney and Rich Dad,
6 signed by Whitney on March 22, and signed by Ms. Lechter for
7 Rich Dad on March 26. And this was seven days and three weeks
8 after Sharon Lechter had told Mr. Zanker that everything was
9 off.

10 THE COURT: Well --

11 MR. RAPOPORT: Excuse me, seven weeks and three days.
12 I misspoke.

13 THE COURT: What?

14 MR. DEITCH: Seven weeks and three days after
15 February 2nd.

16 THE COURT: No, it's not that. She said everything is
17 off with you and we are stopping negotiations with Whitney.

18 MR. DEITCH: Yes.

19 THE COURT: All right.

20 MR. DEITCH: The next exhibit to which I bring the
21 Court's attention is Exhibit 151, 151. This is a March 29th
22 e-mail from Mr. Lechter -- excuse me -- from Mr. Kane to Ms.
23 Lechter. And Mr. Kane, among other things, specifically asked
24 Ms. Lechter if there was anything specific that she wanted them
25 to present when she was coming to Whitney headquarters the

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1 following -- on April 14th. And this is further evidence that
2 the discussions were continuing between Whitney and Rich Dad,
3 despite the fact that there was -- had been no disclosure, no
4 one had told Bill Zanker about this.

5 And I note, your Honor, that Mr. Zanker testified --
6 and this again was completely uncontradicted in this trial --
7 that between February 14th and March 22nd, 2006, in other
8 words, between the waiver and the signing of the letter of
9 intent, he had seen Ms. Lechter and the Kiyosakis at Expos and
10 other events, and none of them had ever told him that Rich Dad
11 was continuing its discussions with Whitney. And this appears
12 in the transcript during Mr. Zanker's testimony on page 209,
13 lines eight through 19.

14 THE COURT: Could you say the pages again?

15 MR. DEITCH: Page 209, line eight to line 19. It's
16 all on 209.

17 THE COURT: Okay.

18 MR. DEITCH: Then of course, your Honor, you know
19 Exhibit 259, 259 was the Whitney amended 10-K for the year
20 2007, and this included a number of agreements signed on
21 July 18th, 2006 between Rich Dad and Whitney formalizing their
22 business relationship.

23 And then Exhibit 181 was the press release that was
24 released in the fall of 2006. And Mr. Zanker testified -- and
25 again this also was completely uncontradicted -- that until he

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1 saw this announcement, he did not know that Rich Dad and
2 Whitney had in fact formed a business, a new free seminar
3 business from which the Learning Annex had been eliminated in
4 February. And that testimony appears on page 358, 358, line
5 nine through 19.

6 And why didn't Mr. Zanker know? He didn't know
7 because no one had told him. And the overwhelming -- the
8 overwhelming and undisputed evidence is that having lied to Mr.
9 Zanker affirmatively about stopping their negotiations with
10 Whitney, Rich Dad then covered it up.

11 And the law is clear, your Honor, that where the
12 failure to disclose material facts creates an inequity, that
13 omission is sufficient to support an unjust enrichment claim.
14 And I refer your Honor's attention to the case of Labajo, which
15 is L-a-b-a-j-o, versus Best Buy stores. The citation is 478 F.
16 Supp. 2d, 523, and this is a case from this District in 2007.

17 If I can go back for one moment. Mr. Harris has
18 handed me exhibit 18, and this is a -- this is a February 7
19 e-mail from Christina -- Christina Porter. She has a
20 hyphenated name, but the last name is Porter. And I believe
21 there was testimony that she worked for Mr. Kiyosaki or for
22 Rich Dad. And it's addressed to Ms. Del Canto and to Mr.
23 Zanker, with copies to Ms. Stanton and to the Kiyosakis. The
24 subject is Kim breakout session. And it says, "Hi, Samantha
25 and Bill. Kim asked me to check with you. She would like to

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1 do a woman and investing breakout session on Saturday
2 afternoon. Can you help me with that? Appreciate your help."
3 And this -- excuse me. And as we mentioned before, the day of
4 the document is February 7, which shows that in fact during
5 that period between February 2nd, February 2 and February 14th,
6 they were still having interaction with Rich Dad.

7 THE COURT: I'm sorry, I lost that entirely. Who was
8 still having contact with?

9 MR. HARRIS: The Learning Annex, your Honor.

10 THE COURT: So what does that prove?

11 MR. HARRIS: Your Honor, it was the -- your Honor, it
12 was the exhibit I mentioned before. I was just trying to refer
13 you to -- you had asked about the conversation Ms. Lechter had
14 with Mr. Zanker, and I had mentioned an exhibit and I just
15 wanted to refer you to that.

16 THE COURT: But that doesn't answer my question,
17 that -- that would be sort of legitimate continued meetings --

18 MR. HARRIS: I understand.

19 THE COURT: -- for purpose, not the results we got to
20 do a waiver.

21 MR. HARRIS: Your Honor, I wasn't making argument. I
22 was just trying to addressed -- I mentioned the exhibit. You
23 had asked if there was testimony about the conversation. I
24 said I thought it had come in in connection with an exhibit. I
25 don't have -- we don't have the transcripts in front of us of

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1 that conversation right here.

2 THE COURT: All right.

3 MR. HARRIS: I was just trying --

4 THE COURT: So what happened on February 7?

5 MR. HARRIS: On February 7, there was a communication
6 from the assistant for the Kiyosakis talking about how Kim
7 Kiyosaki would like to do a woman invest --

8 THE COURT: Talking about Zanker.

9 MR. HARRIS: This goes to Mr. Zanker on Saturday
10 afternoon. Saturday afternoon, you know, would have been
11 fairly close to the 10th or the 11th. I'm just trying to get
12 the dates to your Honor.

13 THE COURT: All right. Okay. All right.

14 MR. DEITCH: Okay. So I talked about the lies, I
15 talked about the cover up. The third category of wrongful
16 conduct is the pretext. And, your Honor, this relates
17 specifically to the juxtaposition of Ms. Lechter's February 2nd
18 termination e-mail, if I can call it that, sent to Mr. Zanker
19 and the drafts dated January 31, 2006 that were found on her
20 computer of letters terminating the Learning Annex. And that,
21 those drafts were Exhibit 124A and --

22 THE COURT: I'm not inclined to pay any attention to
23 her drafts, I must say. What does that mean to you?

24 MR. DEITCH: Let me explain why I think that they're
25 highly relevant for the Court's consideration.

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1 THE COURT: But I'm offended. People do drafts and
2 drafts you tear up and throw away. What's the difference? I
3 do draft opinions. They don't look like the final. Should
4 anybody even know about them, much less attribute them to me?

5 MR. DEITCH: Well, they certainly reflect your
6 thoughts at the time that you set those words on paper.

7 THE COURT: And nothing I care to issue, because three
8 drafts later it didn't look anything like the draft. I mean,
9 it's like thinking to yourself. Are you allowed to read my
10 thoughts? Because they change. I have one thought now, I'll
11 listen to him, I'll have of another thought, I'll listen, I'll
12 have another thought. It's not till I say so that it's a final
13 thought, so to speak.

14 MR. DEITCH: Well, I suggest to your Honor that's
15 exactly the point, which is that Ms. Lechter was trying to come
16 up with reasons why Rich Dad could terminate the Learning
17 Annex. And the reason she came up with within these drafts was
18 the completely false claim that the Learning Annex had not
19 performed.

20 THE COURT: But how can that -- I still wonder how her
21 thinking out loud, so to speak, can bind Rich Dad. That's very
22 troubling. I mean, generally her statements do, I understand
23 that the statement of a high level partner binds the
24 corporation, for sure, but this is a draft -- which she never
25 issued. She was thinking on her computer, doesn't issue it.

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1 Can such a statement be attributed to a corporation? It's not
2 even a statement.

3 MR. DEITCH: I think it's certainly -- recall, your
4 Honor, that Ms. Lechter is the one is going to send the
5 termination e-mail to --

6 THE COURT: Then she said what she said, but the
7 drafts are kind of offensive.

8 MR. DEITCH: Well, I suggest to the Court that it
9 reflects her thought process. And that given the --

10 THE COURT: So it's not a statement that binds the
11 corporation. It shows one partner's thoughts or something, or
12 her state of mind? I guess you call it state of mind?
13 Reflects her state of mind at a point in time?

14 MR. DEITCH: Your Honor, I suggest that Ms. Lechter
15 was acting on behalf of the corporation.

16 THE COURT: She was acting. So it reflects her state
17 of mind on January 31st. Okay, with that in mind, what was her
18 state of mind according to these drafts, because that's the
19 most it reflects.

20 MR. DEITCH: According to these drafts, she was
21 thinking about -- she was thinking about terminating the
22 Learning Annex on January 31st based on the claim that Learning
23 Annex had not performed. And I don't think I need to go
24 through the evidence in this trial, your Honor. It's pretty
25 much the body of the evidence that the Learning Annex performed

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1 the obligations of the Memorandum of Understanding between
2 September 7th and February 2nd.

3 And I suggest, your Honor, that on February 2nd --

4 THE COURT: Well, any other drafts, anything else
5 you're going to attribute to her state of mind, what else was
6 she thinking aloud?

7 MR. DEITCH: I suggest, your Honor, when she testified
8 in her deposition --

9 THE COURT: You mentioned several drafts. What else
10 was she thinking besides what you just said? She was thinking
11 of terminating Learning Annex on the basis that it had not
12 performed. Anything else from those?

13 MR. DEITCH: There's more in the drafts.

14 THE COURT: I know. Is there anything else you want
15 to mention from the drafts?

16 MR. DEITCH: That's what I wanted to mention, your
17 Honor.

18 THE COURT: Okay. That's not what she though, that's
19 not the statement that's eventually made.

20 MR. DEITCH: It's not what she did, and I suggest to
21 you it's because she couldn't, because --

22 THE COURT: That's what she said. When she did send
23 the termination e-mail February 2nd, it said?

24 MR. DEITCH: It said that they were terminating the
25 Learning Annex based on a complaint about a communication from

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1 Ms. Del Canto to a PBS station. And that claim was also
2 incorrect. But it was a completely different basis --

3 THE COURT: Right, the actual termination --

4 MR. DEITCH: -- than what she had been thinking about
5 two days earlier.

6 THE COURT: The actual termination said you're being
7 terminated because of what?

8 MR. DEITCH: The termination says because we haven't
9 been able to communicate well enough. But it forwards, it
10 forwards an e-mail that deals with another issue with the PBS
11 station. And it's at the bottom of that page, which is Exhibit
12 132. That's the actual termination e-mail.

13 THE COURT: So what was this complaint from the PBS
14 station? What was the complaint?

15 MR. DEITCH: The complaint was that, was that the
16 assertion that Rich Dad -- excuse me -- that the Learning Annex
17 was telling this PBS station not to sell or not to provide Rich
18 Dad products. And, in fact, what the message says when you
19 look at it, is that the Learning Annex believed it was in PBS's
20 interest for a variety of reasons not to proceed that way, but
21 if that's what they wanted to do, that's what they should do.

22 THE COURT: Okay.

23 MR. DEITCH: And our suggestion to the Court, your
24 Honor, is that the juxtaposition of these two documents, the
25 drafts and the February 2nd, shows a pretextual reason for the

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1 termination of the Learning Annex.

2 And Mr. Rapoport argued I believe on Friday, his view
3 that the Court has to find a pretext in order to support a
4 verdict. In any case, whether or not that's his position,
5 that's certainly not the law.

6 But having said that, we believe that it is a pretext
7 and that a pretext is sufficient, particularly when it results
8 in an inequity to support an unjust enrichment claim.

9 The last, the last category of wrongful conduct is
10 what I referred to as the prime rose path. This comes from
11 Mr. Kiyosaki's testimony. And the Court certainly recalls that
12 Mr. Kiyosaki testified repeatedly, both in his deposition,
13 which I believe was referenced, and also in his trial
14 testimony, that after December 27th, 2005, he wanted nothing to
15 do with Mr. Zanker or the Learning Annex in terms of doing
16 business with them. And I can give your Honor a couple of
17 citations to the record if you like. Page 695, line 23 through
18 page 696, line four, and also page 699, line two through eight
19 I believe there are other instances, but those are two
20 examples.

21 And, of course, the evidence is undisputed in this
22 case that Rich Dad continued to use the Learning Annex's
23 services to develop a new free seminar business together with
24 Whitney throughout the month of January; that there were
25 critical meetings on January 11th in Phoenix and January 24th

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1 in Coral Gables, Florida, the Whitney headquarters.

2 THE COURT: What was the first one, Phoenix and then
3 Coral Gables.

4 MR. DEITCH: January 11th and January 24th, and --

5 THE COURT: One second. Okay, go ahead.

6 MR. DEITCH: And Ms. Lechter so testified, Mr. Kane so
7 testified, Mr. Zanker so testified. And I can provide -- I can
8 provide citations, but I think that's undisputed that all of
9 them said that these meetings occurred.

10 THE COURT: And why is that a prime rose path?

11 MR. DEITCH: Well, it's a prime rose path because --
12 well, let me just -- there's also two documents that also make
13 clear the existence of the meetings, so let me just reference
14 them; exhibit 113, which was the e-mail that included the MOU
15 two, which describes or recaps the January 11th meeting. And
16 also -- I don't have the other exhibit number -- Mr. Kane's
17 January 27th e-mail. This was the one that had the numbered
18 list, I believe there were 11 items. And it starts with the
19 phrase, so here's what we decided to do. And the first one was
20 form a company owned by these three entities. And Mr. Harris
21 is going to get me that exhibit number which I omitted from my
22 notes.

23 THE COURT: All right. The first one was what, first
24 e-mail before the January 27th e-mail was what?

25 MR. DEITCH: Exhibit 113. This is Mr. Kane's e-mail

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1 that includes -- that we've referred to as MOU two, and the
2 other exhibit is 122A.

3 MR. RAPOPORT: That's the January 27th.

4 MR. DEITCH: Yes.

5 And here's the point, your Honor. I'll wait until --

6 THE COURT: What's the 113 again?

7 MR. DEITCH: 113 is Mr. Kane's January 13th, 2006
8 e-mail that includes the MOU two, says he's recapping the
9 January 11th meeting.

10 THE COURT: Okay.

11 MR. DEITCH: And then one -- you said 122A?

12 THE COURT: Yes.

13 MR. DEITCH: Is the January 27th e-mail.

14 THE COURT: All right.

15 MR. DEITCH: That describes what they decided at the
16 January 24th meeting at Whitney.

17 THE COURT: I see. Okay, got it.

18 MR. DEITCH: And here's the point. If Mr. Kiyosaki
19 truly did not intend to do any further business with Mr. Zanker
20 and the Learning Annex after or as of December 27th, what was
21 he doing?

22 THE COURT: You said the 27th. Did you say 27th or
23 22nd?

24 MR. DEITCH: December 27th is when he sent his letter
25 and that was his testimony. And I'll tell you what he was

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1 doing in January. He was taking unfair advantage of the
2 Learning Annex's services to continue to develop the deal with
3 Whitney with no intention of compensating the Learning Annex.
4 And that's why I say he was leading the Learning Annex down the
5 prim rose path.

6 THE COURT: What was the expression on 12/27; what did
7 he say? That was an e-mail?

8 MR. RAPOPORT: That was the letter, your Honor, the
9 five page letter that Mr. Kiyosaki sent to Mr. Zanker, which is
10 exhibit 96, your Honor.

11 THE COURT: Thank you. All right.

12 MR. DEITCH: And you'll recall Mr. Kiyosaki said very
13 strongly, several times --

14 THE COURT: Oh.

15 MR. DEITCH: -- I wanted nothing to do with them.

16 THE COURT: Oh, yeah.

17 MR. DEITCH: That was pretty clear.

18 So they're leading him down the prime rose path
19 suggesting to the Learning Annex that this is going to be a
20 deal that they're going to make a lot of money on, so that
21 they'll continue to help with their relationship with Whitney,
22 to cement the deal throughout January. And if, in fact,
23 Mr. Kiyosaki did not intend after December to include the
24 Learning Annex in that deal, that is inequitable. And if
25 that's not inequitable, conduct I don't know what is.

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1 On the other hand, your Honor, just to kind of put the
2 end on this. If, contrary to his testimony, Mr. Kiyosaki did
3 not have that intention, then I suggest to the Court that you
4 can infer from that testimony consciousness of guilt about what
5 followed.

6 THE COURT: I'm sorry, I don't understand that.

7 MR. DEITCH: On the one hand, if Mr. Kiyosaki did not
8 intend -- if his testimony was truthful, that he did not intend
9 to have business with the Learning Annex --

10 THE COURT: Right.

11 MR. DEITCH: -- then it's simply unfair conduct taking
12 their services without intention to compensate them.

13 THE COURT: Okay.

14 MR. DEITCH: On the other hand, if he was lying about
15 it here, that that lie shows consciousness of guilt because he
16 knows that he continued to take the services of Learning Annex
17 throughout that ensuing period.

18 THE COURT: Okay.

19 MR. DEITCH: Now, your Honor, when I first stood up I
20 told you that I wanted to address some of the legal issues to
21 make our record, and I'll do it, I'll do it relatively briefly.
22 And I understand that the Court has already ruled on these
23 issues.

24 First, as the Court knows, the jury returned an award
25 in favor of the Learning Annex on the quantum meruit claim, and

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1 we believe that award stands without any further showing.

2 THE COURT: The problem is I've said in this case that
3 it's the law of the case that one of the elements of quantum
4 meruit is unjust enrichment.

5 MR. DEITCH: I understand, your Honor. Our position
6 is that to the extent that there are four elements required for
7 quantum meruit, that this is effectively adding elements to
8 quantum meruit, and we believe that's not required by the law.

9 The second issue is that with respect to unjust
10 enrichment claim, we believe the jury is the proper fact finder
11 the proper body to decide.

12 THE COURT: How can you say that in the face of the
13 New York State Court saying explicitly the jury must never,
14 must never make an award for unjust enrichment? And I quoted
15 it to you from the PJI, so can you take that decision? I'm
16 just curious. How can you close your eyes to New York law?
17 It's quoted in the opinion.

18 MR. DEITCH: Your Honor, Ms. Withers is more familiar
19 than I am.

20 Our view is that while we acknowledge that it's in the
21 petit jury instructions, we believe --

22 THE COURT: That a Court must -- a jury must never --
23 okay, go ahead.

24 MR. DEITCH: We believe there are other lines of case
25 law that suggest otherwise, and we're preserving the issue

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1 because we believe that's the proper view of the law.

2 THE COURT: Okay.

3 MR. DEITCH: The third issue, your Honor, is to the --
4 to the extent that the element of equity and good conscience is
5 an issue for the Court to decide, we think that this is a
6 narrow mandate; that the jury determines the facts as to
7 credibility of witnesses and what inferences.

8 THE COURT: True.

9 MR. DEITCH: I'm sure, your Honor, that you take the
10 position as well that you can consider what -- whether those
11 facts meet the proper character of what is required for unjust
12 enrichment, but not to decide contrary to the jury's findings
13 as to the facts. We believe that that was for the jury.

14 THE COURT: I can't find contrary to the jury's
15 findings of fact.

16 One second. I just want to cite exactly, I want to
17 cite for the record from two, volume two of the New York
18 Pattern Jury Instructions comment to instruction number four
19 point two. "It should never be left to the jury to say the
20 defendant has been unjustly enriched nor should in equity and
21 good conscience repay." I'm just saying that particular
22 committee wrote that.

23 MR. DEITCH: Your Honor, the fourth issue is one I've
24 already addressed, which was simply the question of whether bad
25 faith is required as opposed to simply showing inequity -- yes,

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1 or wrongful conduct. And I just -- two cases to draw the
2 Court's attention to one. Is Rosensweig, which is
3 R-o-s-e-n-s-w-e-i-g versus Friedland, F-r-i-e-d-l-a-n-d. It's
4 a slip opinion from the Second Department, 924, New York State
5 Second, 99, and it's dated May 10 of this year.

6 And the other case -- I'll let you catch up.

7 THE COURT: I got it.

8 MR. DEITCH: Okay, is Ultramar Energy Limited. That's
9 U-l --

10 THE COURT: I know now to spell it.

11 MR. DEITCH: You got it. Okay, versus Chase manhattan
12 Bank, that's 179, Appellate Division Second, 592, that's from
13 the First Department, 1992. And, your Honor, for the reasons
14 that we've described, we submit that the Court should --

15 THE COURT: I'm sorry, what do these two cases stand
16 for?

17 MR. DEITCH: These stand for the proposition that
18 unjust enrichment does not require a showing of wrongful
19 conduct, but rather based on showing that principles of equity
20 and good conscience require --

21 THE COURT: Right, I think that's right.

22 MR. DEITCH: And for the reasons that we've described
23 in the record, that we described, we believe that there's
24 overwhelming evidence, and the Court should make a finding from
25 this hearing in accord with the jury's verdict. Thank you.

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1 THE COURT: Mr. Rapoport?

2 MR. RAPOPORT: Your Honor, just to go over a couple of
3 things that I know we have mentioned in the past, but unjust
4 enrichment damages are not available for activities that
5 otherwise further the plaintiff's own economic interest. It is
6 from Abrams v. Unity Mutual Life, 237 F.3d 866, citing Song
7 Bird.

8 THE COURT: Is that Second Circuit?

9 MR. RAPOPORT: This is Seventh Circuit. Finding that
10 plaintiff's services were designed to promote their own
11 interests, thus they were not unjust.

12 THE COURT: Yes, that's the problem here. I wrote the
13 same thing in a case that I found when I was researching this
14 issue over the weekend called Gidatex v. Campanello, and I
15 cited all the case law ten years ago that said the same thing.
16 OK.

17 MR. RAPOPORT: Now, your Honor, we have been through
18 the factual grounds with Mr. Deitch, but the factual grounds
19 with respect to looking at what truly is bad faith here I
20 believe are not as they have been put to you just moments ago,
21 and so I want to go through a few things just in response a
22 little bit to Mr. Deitch. I do have my own notes as well, but
23 in response to Mr. Deitch there is one thing that I think is
24 left out, and I think is crucial.

25 THE COURT: You think it's crucial?

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1 MR. RAPOPORT: Crucial for the court. And that is in
2 almost -- in all cases a contemporaneous writing is certainly
3 better than a recollection of a conversation six years later.

4 THE COURT: True, OK.

5 MR. RAPOPORT: We have those three contemporaneous
6 writings: December 19, 2005 signed by Robert and Kim Kiyosaki
7 and Sharon Lechter.

8 THE COURT: Is that an exhibit number?

9 MR. RAPOPORT: Yes, it's 94, your Honor.

10 THE COURT: Thank you.

11 MR. RAPOPORT: Then we have the December 27th e-mail
12 from Robert Kiyosaki to Bill Zanker, which is 96, Judge.
13 That's December 27th.

14 THE COURT: I got that.

15 MR. RAPOPORT: Then you also have, which was not
16 mentioned earlier, the apology letter from Mr. Zanker, which is
17 Exhibit 99.

18 THE COURT: And it is dated?

19 MR. RAPOPORT: That is dated January 3, 2006. But,
20 Judge, aside from this the one really important thing that has
21 been overlooked I think by the plaintiffs in this case when
22 they cite Ms. Lechter's conduct and when they site
23 Ms. Lechter's transcript, I don't think this court can forget
24 Mr. Zanker's own words saying that the lawsuit between the
25 Lechters and the Kiyosakis was a vicious one.

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1 So, I think that special notice has to be paid and
2 special weight given to Sharon Lechter's testimony because it's
3 clear while there is no love loss between Mr. Zanker and the
4 Kiyosakis, clearly there is no love loss between Sharon Lechter
5 and the Kiyosakis either.

6 But when Sharon Lechter was called upon to testify,
7 after she had settled with the Kiyosakis, after there was no
8 more financial interest whatsoever, all she had to do was just
9 simply -- I mean Mr. Deitch is talking about her state of mind
10 on the 31st when she was writing drafts -- all she had to do at
11 any point in time was to say, listen, you know, we used him, we
12 through them away because this is what bad people like -- I
13 didn't want to do it, but Robert and Kim are bad people and
14 this is what they did.

15 It is crucial to listen to the testimony of Sharon
16 Lechter on a few different points, but clearly when she is
17 talking about the termination itself, and when she is talking
18 about the December 19th, the December 27th letters and the
19 issues that arose, and when she is talking about something
20 else -- Mr. Deitch mentioned the January 24th meeting in
21 Florida, I think that Mr. Deitch -- while Mr. Kane wrote an
22 e-mail at the end of it, the real key to that meeting takes
23 place with Sharon Lechter in the bathroom.

24 Sharon Lechter testified -- and it was read into the
25 record here -- Sharon Lechter testified that she was so shocked

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1 by the changes in the nature of the business that were being
2 suggested to her that day, that because -- and if you also
3 remember, Judge, she testified she had been unplugged for a
4 while because her father had died.

5 THE COURT: I do remember that.

6 MR. RAPOPORT: OK. So, she testified that after being
7 unplugged she went to this meeting, which means that she hadn't
8 really paid attention to anything. She goes to the meeting.
9 They are talking to her about different -- what she considers
10 to be different terms.

11 THE COURT: Who is they?

12 MR. RAPOPORT: The Learning Annex and Whitney.

13 THE COURT: Learning Annex and Whitney.

14 MR. RAPOPORT: Yeah. And she's so -- her word was
15 shocked -- I will get to it eventually, but her word was that
16 she was shocked at what had happened. And she called Robert,
17 and she said to Robert did you do anything to change what we
18 were talking about here? And Robert said no. She went back,
19 she told everybody that. And at the end of the day while John
20 Kane sent out action points, all you have left is Sharon
21 Lechter's testimony that when she left there she was shocked
22 that things had been changed in a way that she didn't recognize
23 them. And the one person in the world who you wouldn't expect
24 to stand up and help our case --

25 THE COURT: Right.

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1 MR. RAPOPORT: -- is Sharon Lechter, but at every step
2 she ratifies what we were saying about good faith.

3 And now I will sort of go through what I had.

4 One of the first things I wanted to talk to the court
5 about is Exhibit AA, and that was the limited partnership which
6 your Honor said I could not argue to the jury. And I think
7 this agreement is very important because -- I mean I can cite
8 you through it, but the end result of this agreement is on
9 Exhibit 4.9 to the agreement, and the end result here is that
10 for consideration Learning Annex LLC transferred to this new
11 entity -- in order to get financing or whatever it wants, but
12 we don't know because it was all redacted and blacked out --
13 Learning Annex transferred for consideration their rights to
14 this lawsuit.

15 I believe that at any point in time this jury should
16 have known, or you as the arbitrator now of unjust enrichment
17 should know that if I've already gotten my consideration for
18 something, how is it that I am entitled to get my consideration
19 twice for the same thing, which is this lawsuit?

20 THE COURT: Can I look at the exact language of
21 transferring the rights of this lawsuit to whom?

22 MR. RAPOPORT: To Learning Annex LP, the new entity.

23 THE COURT: So, who is Learning Annex LP?

24 MR. RAPOPORT: That's the whole point, Judge. It's
25 some new entity that they transferred all their assets to.

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1 THE COURT: Yes, but isn't it all Zanker anyway?

2 MR. RAPOPORT: No, this is their new -- this is a
3 financing partner who came in and provided whatever amounts of
4 money. We don't know; it's all blacked out.

5 THE COURT: But I am asking the plaintiffs lawyers.
6 If indeed Learning Annex LLC transferred its rights to this
7 lawsuit to Learning Annex LP, shouldn't you have added Learning
8 Annex LP as a party plaintiff?

9 MS. WITHERS: Your Honor, I have spoken briefly with
10 the corporate lawyer who handled this. My understanding is
11 that this was part of a financing transaction that was a merger
12 and that we can discuss further with that corporate attorney in
13 case there are other implications, but there is no reason that
14 I know of that we can't just add them under Rule 25.

15 THE COURT: Who has an interest in Learning Annex LP?
16 Who has the financial interest in that company?

17 MR. HARRIS: Your Honor, Mr. Zanker testified about
18 his ownership interest in Learning Annex.

19 THE COURT: Don't say Learning Annex. I am trying to
20 distinguish Learning Annex LLC from Learning Annex LP.

21 MR. HARRIS: I am trying to be clear. Mr. Zanker --
22 it is not an identical group of owners between the plaintiffs
23 in this case and Learning Annex LP, but it's very similar
24 owners, and Mr. Zanker has a material interest in that company.

25 THE COURT: Well, who is Learning Annex LP? Who is

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1 the owner?

2 MS. WITHERS: It's Mr. Zanker and another investor,
3 CMS.

4 THE COURT: Yes. And who else? That's it?

5 MS. WITHERS: That's what Mr. Zanker is able to
6 remember off the top of his head. We would have to refer to
7 the corporate records to be detailed.

8 THE COURT: So, you don't know the percentages right
9 now. Right?

10 MR. ZANKER: I don't know.

11 THE COURT: What's this exact language of at
12 agreement?

13 MR. RAPOPORT: Your Honor, in this agreement, it's
14 page 10 --

15 THE COURT: I don't have a copy.

16 MR. RAPOPORT: Sorry.

17 THE COURT: Because I have the book called Plaintiff's
18 Admitted Trial Exhibits.

19 MR. RAPOPORT: Right, it's in that.

20 THE COURT: Plaintiff's admitted?

21 MR. RAPOPORT: Sorry. Defendants.

22 THE COURT: I wasn't given a defendants book.

23 MR. RAPOPORT: You don't have it?

24 THE COURT: I was given the plaintiff's book.

25 MR. RAPOPORT: We gave it to the court, it went to the

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1 jury. I thought you got it back. We didn't receive it back.

2 THE COURT: So, maybe it's sitting in the jury room
3 right now. Could one of my clerks go in there to see if
4 anything is in there? See if any of these black notebooks are
5 in there. Thank you.

6 Anyway.

7 MR. RAPOPORT: Your Honor, I mean I have another copy.

8 THE COURT: OK, hand it up.

9 MR. RAPOPORT: It has yellow post-its in it, but if
10 you look at page 10, your Honor.

11 THE COURT: Page 10 of the agreement?

12 MR. RAPOPORT: That's correct. It's marked at the
13 bottom LA for Learning Annex 18071.

14 THE COURT: OK.

15 MR. RAPOPORT: 2.1 is the contribution and acquisition
16 of acquired assets.

17 THE COURT: OK.

18 MR. RAPOPORT: And so that in 2.1 it refers to --
19 within are referred --

20 THE COURT: Well, who is the seller?

21 Oh, look what we found, notebooks. OK.

22 MR. RAPOPORT: I apologize, Judge.

23 THE COURT: That's OK. So, that's probably the
24 plaintiff's and defendants' exhibits.

25 MR. RAPOPORT: Right.

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1 MR. DEITCH: May we use the defendant's copy so we can
2 see this agreement as well?

3 THE COURT: Oh, you don't have it? Yes, you can. I
4 was going to let my law clerk follow along, but go ahead.

5 So, you need to look at page 10. He is referring to
6 page 10.

7 MR. RAPOPORT: Right.

8 THE COURT: Well, give him a minute. They have to
9 find it.

10 MR. RAPOPORT: Under the --

11 THE COURT: Hold on. Wait until the plaintiffs get to
12 page 10.

13 2.1 at the bottom of the page it says contribution and
14 acquisition of acquired assets.

15 MR. RAPOPORT: And then you see the schedule.

16 THE COURT: Before that, before that I see the seller
17 is LA LLC.

18 MR. RAPOPORT: Correct. And, Judge, if you go down on
19 page 11 you will see under xii is "All seller's claims, causes
20 of action and other legal rights and remedies, whether or not
21 known on the closing date, relating to seller's ownership of
22 acquired assets and/or the operation of seller's business,
23 including the claims and causes of action and legal rights set
24 forth in schedule 2.1A."

25 Now, schedule 2.1A then is on page -- it's on page

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1 18137, Judge, Learning Annex marked page 18137.

2 THE COURT: OK.

3 MR. RAPOPORT: And there it says, "Acquired assets
4 claimed against Rich Dad and Whitney Education, detailed on
5 attached schedule 4.9A." And then when you go to schedule
6 4.9A, which is virtually all blacked out and redacted except
7 for a small part, that's Learning Annex 18180. It refers to
8 this lawsuit filed December 29, 2008.

9 Now, one other page, Judge, that wasn't in that chain
10 but that I would refer the court to is page 14 of the agreement
11 itself. The bottom is blacked out, but before the bottom it
12 says "the consideration provided by partnership to seller for
13 acquired assets shall be as follows..." So, clearly they got
14 consideration for selling this claim.

15 So, as far as the argument that we make is that they
16 have already been paid once what they consider fair
17 consideration for this claim, and when you are talking about
18 equity injustice, to be paid twice obviously is inequitable.

19 THE COURT: Well, look, the long and short is the
20 plaintiffs have a real problem. The cause of action was
21 transferred to the partnership. If you look at page 1 of the
22 agreement it says, "Asset contribution agreement parties. The
23 Learning Annex LP (herein after known as the partnership),
24 Learning Annex LLC, (herein after the seller)." And it does
25 say seller transfers all this to the partnership, explicitly

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1 naming this claim. So, this claim doesn't belong to The
2 Learning Annex LLC, which is the seller, it belongs to The
3 Learning Annex LP, without a doubt.

4 MR. HARRIS: Your Honor, two things about that. One
5 is they have the economic interest in the claim but Learning
6 Annex Holdings is still entitled to continue as the plaintiff
7 in the case.

8 THE COURT: What are you talking about? They sold
9 this claim.

10 MR. HARRIS: Your Honor, my understanding of the law
11 is that if I transfer -- if I bring a claim and I transfer an
12 economic interest in that claim --

13 THE COURT: Not an economic interest. You sold the
14 entire claim. It's gone, you sold it.

15 MR. HARRIS: I understand that. If I sell the claim
16 --

17 THE COURT: You sold the claim, it's no longer yours,
18 you gave it away.

19 MR. HARRIS: Then I am still the proper plaintiff.

20 THE COURT: Why is that? You gave away the claim.
21 It's not your claim. You sold it to somebody else. A sold the
22 claim to B. B can bring the lawsuit.

23 MR. HARRIS: I am still the person that has been hurt
24 by the conduct of Rich Dad.

25 THE COURT: You sold the claim. There is no point in

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1 our arguing. You sold the claim. You've got a problem. You
2 sold the claim to somebody else.

3 MR. HARRIS: And then the second thing, your Honor, is
4 that we believe that we could add Learning Annex LP as a proper
5 party under the rules.

6 THE COURT: I think that's probably the only way out,
7 not pretty but the only way out.

8 MR. RAPOPORT: Your Honor, I mean obviously it's after
9 the trial.

10 THE COURT: I realize that. But judgment hasn't been
11 entered. In fact the trial is continuing as we speak. This
12 trial is not over because it has a nonjury component, so you
13 can't say it's after the trial has ended. It hasn't ended. At
14 your own request there is a nonjury component. So, the trial
15 is not over until I --

16 MR. RAPOPORT: I understand. I misspoke. A
17 apologize.

18 THE COURT: So, probably the first motion to consider
19 is your motion under Rule 25 to add Learning Annex LP as a
20 party plaintiff. Are you making the motion?

21 MR. HARRIS: Yes. Yes, your Honor.

22 MR. RAPOPORT: Your Honor, in August --

23 THE COURT: August of?

24 MR. RAPOPORT: -- of I believe 2010 at a conference
25 before the court the request was made to amend when we were

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1 talking about the summary judgment motion. I don't know if you
2 recall it.

3 THE COURT: I do not recall it.

4 MR. RAPOPORT: OK. In that there was a request made
5 to amend, and the request was already denied.

6 THE COURT: So add this party plaintiff?

7 MR. RAPOPORT: Well, they said they wanted to amend
8 the complaint, and that was denied at that time.

9 THE COURT: I have no idea what that request was. I
10 don't know what they wanted to add. Maybe there is
11 correspondence, maybe a motion. I don't know what they wanted
12 to add in August 2010.

13 MR. RAPOPORT: Your Honor, I maintain obviously
14 though, regardless, I mean if your Honor agrees at this late
15 time to amend the complaint, it still doesn't change the fact
16 that Learning Annex LLC has received consideration already for
17 its claim in the first place.

18 THE COURT: Well, I don't think that's entirely fair.
19 This is a package of a lot of things being transferred to
20 Learning Annex LP, a lot of things. One of those things is
21 whatever Learning Annex LP might recover. So it's a claim that
22 essentially at that point can't be valued. The claimants
23 transferred that to that party; that party can then sue. I had
24 this case already. It's just another case, but I had it. Do
25 you want to know the name of that case that took ten years to

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1 resolve too?

2 MR. RAPOPORT: I would be happy to look.

3 THE COURT: Oh, boy. Load funding. I don't remember
4 the rest of the details, but it was exactly that, the claim was
5 sold and somebody else brought the claim.

6 MR. RAPOPORT: Does your Honor happen to have the name
7 handy? Is that a nightmare you remember that you could give
8 me?

9 THE COURT: You wouldn't want to know. It was such a
10 complex case. One of the interesting issues in the case was
11 champerty, because champerty actually was raised because they
12 were selling a claim. It was interesting solely for the
13 purpose of bringing a lawsuit, which is not true here. That
14 was the sole purpose of the transfer, to be able to bring a
15 lawsuit. It was very interesting because in the end it went
16 from the Second Circuit to the New York Court of Appeals, and
17 the New York Court of Appeals I think was worried about
18 mortgage foreclosures. It's when the markets started to fall
19 apart, and everybody was selling claims. It's more than you
20 wanted to know, but they had to reject champerty, or the
21 financial crisis would have been worse than it was.

22 MR. RAPOPORT: Always happy to learn, Judge.

23 THE COURT: It was really fascinating how this played
24 out.

25 The good news in the case, however -- this may be

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1 worth saying on the record -- after an endless trial, after
2 endless appeals with the Second Circuit and the New York Court
3 of Appeals case, it settled. It settled. S-e-t-t-l-e-d.

4 MR. HARRIS: Your Honor, Mr. Rapoport and I have
5 already spoken to your clerk.

6 THE COURT: So I hear. My clerk suggests 10:30 on
7 July 28. Whatever she says is usually right. So, if she says
8 so.

9 MR. RAPOPORT: Your Honor, as I mentioned through
10 Ms. Simonson, I need to confirm that date and time for sure.
11 We believed that was going to be OK, but I still have parties I
12 can't reach, so that's why I said that.

13 MR. HARRIS: And plaintiffs are available, your Honor.

14 THE COURT: Look, continue to work with Ms. Simonson
15 in getting us a date. So we can do that promptly.

16 MR. HARRIS: Thank you, your Honor.

17 Anyway, you made the motion right now to add the party
18 plaintiff. If you want to oppose it in writing, I guess I
19 can't stop you, but do it very promptly. I would say today is
20 Wednesday. Next Wednesday? If you are going to oppose it in
21 writing, you have to do it by next Wednesday.

22 Then you don't need to do in writing on the moving
23 papers, you can do it all in the reply. You have made the
24 motion orally. If they do submit a writing by next Wednesday,
25 let's make sure this all happens before the settlement -- next

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1 Wednesday is the 20th? So, hopefully if you could respond by
2 the 25th, which will be before we meet.

3 MR. HARRIS: Thank you, your Honor.

4 THE COURT: It's an important point. I understand. I
5 think we're done with it.

6 MR. RAPOPORT: Yes, I'm going on to something else.

7 THE COURT: Oh, good, OK, OK.

8 MR. RAPOPORT: Now, your Honor, basically the heart --

9 THE COURT: Let me hand this back to you. Go ahead.

10 MR. RAPOPORT: The heart of my argument -- which I
11 sort of started out of sequence but I'll go back to it -- goes
12 back again to those letters on December 19 and December 27, and
13 it goes to what has been claimed to be the bad faith of my
14 clients, but the evidence hasn't really showed that, and I will
15 tell you why.

16 Those two letters are the only contemporaneous
17 writings, along with Mr. Zanker's apology letter. So, anything
18 else is something you could talk about five or six years later,
19 but the reality of it is that these are the writings we have.

20 THE COURT: Why do you say those are the only
21 contemporaneous writings? He started his presentation I think
22 by talking about the two February 2nd writings.

23 MR. RAPOPORT: These are the substantive writings that
24 exist to show what was in the minds of my clients.

25 THE COURT: In December.

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1 MR. RAPOPORT: In December. And these two letters,
2 while your Honor has heard painstaking detail about them, there
3 are a couple of things in there that we keep repeating. One is
4 there was a three-way deal that Mr. Zanker tried to get Donald
5 Trump to sign first and then go to Mr. Kiyosaki. There is no
6 question but that anybody in Mr. Kiyosaki's position or Sharon
7 Lechter's position or Kim Kiyosaki's position would have the
8 right to believe at that point they were trying to be leveraged
9 into a deal they never agreed to.

10 THE COURT: OK.

11 MR. RAPOPORT: But the key to these -- and also you
12 will have to remember Mr. Deitch was talking about Mr. Kiyosaki
13 going to the meeting of January 11. In Mr. Kiyosaki's letter
14 on the 27 he said this is not to say that we will never be
15 partners. It was a personal letter where he believed that Bill
16 Zanker had gone off the rails. He wasn't saying in this letter
17 I'm never going to speak to you again, I'm never going to meet
18 you again, I'm never going to talk to you again. He didn't say
19 it.

20 So, the fact that he spoke to him again or even tried,
21 even if he tried to work out a way to bring Mr. Zanker back
22 into the fold, if you will, while in his own mind he believed
23 that wasn't going to happen as of the 27. You can't now come
24 to him and say because you went to a meeting on the 11th --

25 THE COURT: Well, it's more than that. When he

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1 testified at the trial he basically said I never want to do
2 business with this man again. He was very definitive.

3 MR. RAPOPORT: Right.

4 THE COURT: But then they point out the two meetings
5 in January.

6 MR. RAPOPORT: No, the one meeting. He went to one.

7 THE COURT: But there were two meetings with Rich Dad,
8 with Rich Dad the company.

9 MR. RAPOPORT: Right, keeping in mind that there were
10 three principals.

11 THE COURT: Yes, of course.

12 MR. RAPOPORT: And that one principal doesn't decide
13 for all.

14 THE COURT: Except the first letter was from Robert
15 and Kim, Exhibit 94.

16 MR. RAPOPORT: Right.

17 THE COURT: Maybe it was all three; I don't really
18 know.

19 MR. RAPOPORT: And that terminated the MOU.

20 THE COURT: And then Exhibit 96 is from Robert only.

21 MR. RAPOPORT: Right. And that terminated the MOU
22 again.

23 THE COURT: There is none from Robert, Kim and
24 Lechter?

25 MR. RAPOPORT: No. The first was from Robert, Kim and

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1 Sharon on December 19. The second was just a personal letter,
2 as Robert testified, from Robert to Bill Zanker.

3 THE COURT: OK.

4 MR. RAPOPORT: But the key to these letters, your
5 Honor, when you are seeking to determine what was the good
6 faith or lack of good faith on the part of people, one of the
7 keys s to these letters aside from the fact that they're
8 contemporaneous, they explain exactly situations that are
9 reasonable to them, was that Bill Zanker in his own apology
10 letter not only did he acknowledge that all of their claims
11 were correct, but he also said a couple of things in that
12 apology letter that were also very important, and he said in
13 the transcript:

14 "Q. Do you see in the second sentence with it starts "but I
15 can't. I can apologize, and I can explain what I saw. I
16 messed up thought, so I'm not sure an explanation helps, but I
17 think our relationship deserves it, I understand it doesn't
18 cure the ills."

19 Even Bill Zanker -- and that's his transcript page
20 342?

21 THE COURT: I don't understand what that means to you.

22 MR. RAPOPORT: It's simple. What it means is that
23 Bill Zanker is acknowledging at this trial he knew a mere
24 apology wasn't enough. There have been arguments made that
25 simply which by apologizing and by going to a meeting on the

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1 11th that Robert was now saying everything is fine. But Zanker
2 himself acknowledged that an apology alone doesn't cure all
3 ills.

4 And Mr. Zanker further in that letter, it goes on, he
5 basically goes on in his apology letter to acknowledge all the
6 claims that were made by Mr. Kiyosaki, by Mr. and Mrs. Kiyosaki
7 and Sharon Lechter in the two letters. So, at that point in
8 time you have Mr. Zanker himself confirming that what they've
9 said is correct. You then have the parties meeting again and
10 meeting again on the 11th and the 24th of January.

11 THE COURT: Right.

12 MR. RAPOPORT: So, an effort by the parties there to
13 do something together is not -- is not -- I don't see how you
14 say that's bad faith by saying, OK, let me try and see if we
15 can't work something out. Mr. Kiyosaki went to one meeting.

16 THE COURT: At most the point would be that you would
17 knock out the fourth of Mr. Deitch's argument, the primrose
18 path argument, because I noted all the dates there. That
19 started with after 12/27 Kiyosakis says I don't want to do
20 business with you, and then lo and behold there are two
21 meetings. So, at most you have gotten rid of the fourth of his
22 three, but that still leaves his other three points which he
23 calls lies, cover-up and pretext.

24 MR. RAPOPORT: We're not done. We're not done yet.
25 The other thing about Mr. Zanker's e-mail from page 302 of the

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1 trial is you asked him, the court:

2 "THE COURT: If you were considering going in business
3 with someone whose ethics were questioned, would that be good
4 for you?

5 "THE WITNESS: No."

6 Mr. Zanker knew if you were going into business with
7 somebody and you thought they were dishonest, it's not a good
8 thing. Even he acknowledged it.

9 So, what happened was there were legitimate questions,
10 and it's uncontroverted that there were legitimate questions on
11 the part of the Kiyosakis as to whether or not this was the
12 right person to get into this kind of business with.

13 They had been doing the expo forever. They both --
14 for a year. They both made money on the expos. They had
15 agreed without question to continue to do the expos, and they
16 did it. Somehow that has become evidence somehow of bad faith
17 because they agreed to do the expos and they did them. So, I'm
18 not quite certain how that plays out.

19 The reality of it is that by doing the expos they
20 continued what was a benefit to both parties, and, you know,
21 that's all the business that they were doing,. For certain the
22 other business they were doing was to try and determine if they
23 could get into business together, and because of the issues
24 raised in the 19th, on the 27th and the rest, the Kiyosakis and
25 Ms. Lechter decided not to.

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1 But, again, Judge, when you get to the issue of bad
2 faith, aside from the fact that Mr. Zanker ratified everything
3 the Kiyosaki said and Ms. Lechter said about why they no longer
4 trusted him and wanted to do business with him, aside from that
5 you must take into consideration, even as we now get to the
6 February 2 e-mail -- which is the third time they terminated
7 this relationship. The third time -- but when you get to that
8 e-mail again you have to remember that Sharon Lechter testified
9 in this case. At no point in time did Sharon Lechter ever say
10 anything about the fact that the Kiyosakis, you know, wanted
11 her to go down the road and try and somehow take advantage of
12 Mr. Zanker. Sharon Lechter was the one who said that on the
13 25th when she went to a meeting she was shocked.

14 This is not evidence of bad faith. This is evidence
15 of good faith and trying to make a deal happen. But then after
16 a while you just realize you can't deal with these people
17 anymore, and you just decide not to do it.

18 Now, if you go and you write a draft of a letter and
19 decide not to send it, I don't see what that does either, but I
20 will tell you that by sending an e-mail on the 2nd of February
21 and for the third time saying we're done, everything is off, we
22 no longer want to be in business with you --

23 THE COURT: Well, that would be OK if it stopped at
24 that. But then it said we are stopping negotiations with
25 Whitney.

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1 MR. RAPOPORT: Right, of course. Now we are going to
2 talk about this. Why she threw that in, I don't know.
3 However, I will tell you that stopping doesn't mean never
4 starting again.

5 THE COURT: Never, but we are talking about eight
6 minutes.

7 MR. RAPOPORT: Well, that would be nice if the eight
8 minute e-mail -- which everybody loves so much and which people
9 think is so funny -- had anything to do with negotiations other
10 than saying we love your company.

11 THE COURT: No, it said more.

12 MR. RAPOPORT: Let's talk.

13 THE COURT: No, no, it's an invitation. It's an
14 overture. It says we love your company, please call. If
15 that's not an opening of negotiations --

16 MR. RAPOPORT: Your Honor, it doesn't say we love your
17 company so please call because we want to talk about points
18 one, two, three, four.

19 THE COURT: But you can read that into it. I'm sorry,
20 but when somebody says we love your company, please call,
21 they're opening negotiations. They are certainly not stopping
22 negotiations; they are opening negotiations.

23 MR. RAPOPORT: Well, they are opening them again eight
24 minutes later, which is if you want to call it opening -- and I
25 don't believe that --

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1 THE COURT: Well, I do. I think you're stuck.

2 MR. RAPOPORT: But it's still eight minutes later.

3 And the other thing is there is something that I don't think we
4 are taking into consideration at all when it has to do with
5 Mr. Deitch's cover-up.

6 First of all, we had the right to terminate this
7 agreement anytime we wanted to. But, secondly, when it comes
8 to this cover-up that Mr. Deitch is talking about, this isn't a
9 cover-up. This is business. We have no obligation to go to
10 anyone and talk to them.

11 THE COURT: No, you're mixing up -- he was very
12 organized. I was in the lie column; I wasn't up to the
13 cover-up. The cover-up he says is that there is all this going
14 back and forth between Whitney and Rich Dad, of which Zanker
15 doesn't know. That's all. That's what he calls the cover-up,
16 that he doesn't know until there is a public announcement.

17 I have a jury selection scheduled for noon, and I knew
18 that. Did you start at 11:30; I know you don't believe it.

19 MR. RAPOPORT: I'm sorry. Judge, there are just a
20 couple of points I have to make quickly, I guess.

21 One of the most important points also, aside from
22 Ms. Lechter in effect ratifying all of the acts of herself and
23 the Kiyosakis when she didn't have to, comes from what happens
24 next. If you want evidence of good faith and the fact that we
25 were the ones dealing in good faith, then forget about people

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1 talking. Take a look at the fact that, one, Bill Zanker, who
2 is I think if nothing else proved to be voluble at some point,
3 Bill Zanker finds out in September -- regardless of what
4 primrose path -- finds out in September and doesn't say a
5 thing. He has lawyers, he has everybody. The day after he
6 finds out in September, or when he finds out in June and says
7 he's got a gut feeling, no lawyer writes anything.

8 What is the next contact? The next contact is Bill
9 Zanker in June of 2007 telling the Kiyosakis in an e-mail I
10 have boat loads of money for you, we can make boat loads of
11 money. And if you want more evidence of good faith, Judge, and
12 more evidence of what the state of mind of the Kiyosakis was,
13 remember that their response to Bill Zanker offering them boat
14 loads of money is to do exactly what they said they were doing
15 in February of 2006, and that is not to do business with him
16 anymore. They didn't even respond. They didn't even seek to
17 look and see how much of this boat loads of money that they
18 could have.

19 And somehow you are being asked to decide that it is
20 fair and just that The Learning Annex should wait for two years
21 and nine months or ten months before it says boo.

22 THE COURT: The problem with that argument is that I
23 didn't write the statute of limitations.

24 MR. RAPOPORT: It's not a statute of limitations
25 argument.

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1 THE COURT: I understand. It's equity.

2 MR. RAPOPORT: Right.

3 THE COURT: We are talking about an equitable claim,
4 so equitable remedy. So, if it's not a statute of limitations,
5 it's laches. Do I think it's laches that he waited for two
6 years? That's the equitable equivalent of the statute of
7 limitations.

8 MR. RAPOPORT: Right. But what we are doing here is
9 you are trying to go back to February of 2006 and decide what
10 is in people's minds.

11 THE COURT: I have to do that.

12 MR. RAPOPORT: And I am telling you it's clear that
13 there was no foul in Bill Zanker's mind in 2006, 2007 when he
14 wrote the e-mails, 2008 until December.

15 When Bill Zanker found out that the February 14th
16 waiver e-mail supposedly that was just asked for for
17 housekeeping reasons, supposedly was such an evidence of bad
18 faith, he still didn't say a thing, nor did his lawyers who
19 were copied on it.

20 When they found out that the February 2 --

21 THE COURT: What happened in December of '07?

22 MR. RAPOPORT: December of '08 they filed a complaint.

23 THE COURT: Sorry, '08. What happened? Why did he
24 suddenly wake up? You don't know.

25 MR. RAPOPORT: No. But what I will say is that all of

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1 his actions are consistent with the fact that Mr. Kiyosaki,
2 Mrs. Kiyosaki and the Lechters did nothing wrong, that they
3 terminated him. But, you know, you have to believe here that
4 Bill Zanker didn't scream foul in 2006. 2007 he not only
5 doesn't scream foul but he says, hey, lets do more business
6 together. 2008 he doesn't scream foul until December. And he
7 does all of this because he believes on February 2 they somehow
8 cut him out of this deal unlawfully, or he believes on February
9 14th that they somehow tried to get him to sign this letter by
10 fraud.

11 The real fraud here is Mr. Zanker himself whose
12 affidavit in the motion for summary judgment spells out some
13 completely different story about how it was that he was, he
14 said, coerced into signing the February 14 e-mail, that he
15 never testified to here, never testified to in his original
16 deposition.

17 His original deposition the only thing he said -- he
18 didn't testify to the one conversation he supposedly had. The
19 only thing he said was Sharon Lechter called me and said she
20 wanted it for housekeeping purposes. And that's it.

21 But I think that the best evidence here of the fact
22 that in the mind of Bill Zanker and in the mind of Learning
23 Annex nothing was wrong, there was no deceit, there was no
24 fraud, is that they never so much as said a word. Not one
25 word. The only thing they wanted to do was more business with

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1 the Kiyosakis. And the only thing the Kiyosakis wanted to do
2 was say that their letters from December were correct, they
3 didn't want to do business at all.

4 THE COURT: OK, I think I must stop. I scheduled a
5 jury selection for 12, and we are way past that. I've got to
6 move on.

7 So, I think I've got the gist of everybody's argument,
8 and I reserve decision.

9 MR. RAPOPORT: Thank you, your Honor.

10 MR. HARRIS: Thank you, your Honor.

11 THE COURT: But please get back to my clerk on that
12 date.

13 MR. RAPOPORT: Yes, Judge.

14 THE COURT: Thank you. All right. Thanks, everybody.

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